Majlis Bandaraya Petaling Jaya v Bonifac Lobo a/l Robert V Lobo

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(NCvC)(A)-520–09 OF 2021
LEE SWEE SENG, GUNALAN MUNIANDY AND AZMAN ABDULLAH JJCA
17 OCTOBER 2023

Civil Procedure — Jurisdiction — High Court — Respondent was summoned and charged under s 70(1) of Street, Drainage and Building Act 1974 at magistrate court by appellant — Respondent sought declaration at High Court that appellant's complaint was without basis and invalid — High Court allowed respondent's application — Whether High Court came to determination on charge in court below and encroached into realm of criminal jurisdiction beyond purview of application vide originating summons before her under High Court's civil jurisdiction — Whether High Court erred in holding that charge against respondent in magistrate court under s 70(16) of Street, Drainage and Building Act 1974 was bad in law

The respondent was the registered owner of a premise in Petaling Jaya, Selangor ('the premises') while the appellant was a local authority created under the Local Government Act 1976. The respondent was summoned by the appellant via a complaint relating to an overhead shelter built on the accessory parcel to the premises without prior permission from the appellant. The respondent was charged under s 70(1) of the Street, Drainage and Building Act 1974 ('SDBA') at the magistrate court ('MC'). The respondent filed an originating summons ('the OS') at the High Court under s 35 of the Courts of Judicature Act 1964 ('the CJA') for a declaration that the complaint made by the appellant was without basis dan invalid at law. The learned High Court judge ('HCJ') came to a finding that the respondent as the owner of the premises could not be deemed to have erected the building or be held liable based on the presumption in s 70(17)(a) of the SDBA for the erection of the structure on the accessory parcel to the premises and allowed the respondent's application. Hence, this appeal. The appellant contended that the HCJ fell into serious error when she proceeded to make a finding on the charge under s 70(1) of the SDBA that was pending before the MC where the trial had already begun.

Held, allowing the appeal:

(1) The various issues raised by the respondent in the OS commenced pursuant to s 35(1) of the CJA against the action taken or complaint made by the appellant were premature given the fact that the same

subject-matter was pending trial at the MC. The respondent retained the right to put forth his defence and answer the charge at the MC in accordance with law and procedure prescribed in the Criminal Procedure Code ('the CPC'). Hence, the respondent's action in commencing the present action to strike out the charge at the MC before conclusion of the trial was not only premature but was tantamount to an abuse of the court process. The respondent was misconceived in contending that the High Court in exercising its supervisory jurisdiction could in law make that finding at supervisory stage about proceedings midway in the court below under s 35 of the CJA which provided for review '… at any stage …' of proceedings in the MC. Such review would not extend to making findings of fact within the purview of the trial court (see paras 29 & 33).

(2) The HCJ had failed to appreciate that she was exercising her supervisory powers under the High Court's original civil jurisdiction and not its criminal jurisdiction in accordance with the CPC. Hence, the HCJ had fallen into an error of principle when she came to a decision that the said charge rightly brought before the MC was bad in law. There was no question that the charge was within the jurisdiction of the MC provided for under the Subordinate Courts Act 1948. The HCJ had acted beyond the High Court's civil jurisdiction when she granted the orders sought which were akin to a declaration against a pending proceeding in a criminal court, albeit in a court subordinate to the High Court. The HCJ had clearly erred in law to decide in a civil action the validity of a criminal charge that had yet to be determined by a MC exercising criminal jurisdiction. The declaratory order sought in the High Court plainly pertained to criminal law and the High Court in the exercise of its civil jurisdiction was clearly not vested with powers to grant the said order (see paras 36–37 & 42).

[Bahasa Malaysia summary

Responden adalah pemilik berdaftar sebuah premis di Petaling Jaya, Selangor ('premis') manakala perayu adalah pihak berkuasa tempatan yang diwujudkan di bawah Akta Kerajaan Tempatan 1976. Responden telah disaman oleh perayu melalui aduan berkaitan tempat perlindungan overhed dibina di atas petak aksesori ke premis tanpa kebenaran terlebih dahulu daripada perayu. Responden didakwa di bawah s 70(1) Akta Jalan, Parit dan Bangunan 1974 ('AJPB') di mahkamah majistret ('MM'). Responden memfailkan saman pemula ('OS') di Mahkamah Tinggi di bawah s 35 Akta Mahkamah Kehakiman 1964 ('AMK') untuk pengisytiharan bahawa aduan yang dibuat oleh perayu adalah tanpa asas dan tidak sah di sisi undang-undang. Hakim Mahkamah Tinggi yang bijaksana ('HMT') membuat keputusan bahawa responden sebagai pemilik premis tidak boleh disifatkan telah mendirikan bangunan itu atau dipertanggungjawabkan berdasarkan anggapan dalam s 70(17)(a) AJPB untuk pembinaan struktur pada petak aksesori ke premis dan

membenarkan permohonan responden. Oleh itu, rayuan ini. Perayu berhujah bahawa HMT jatuh ke dalam kesilapan yang serius apabila meneruskan untuk membuat dapatan atas pertuduhan di bawah s 70(1) AJPB yang belum selesai di hadapan MM di mana perbicaraan telah pun bermula.

Diputuskan, membenarkan rayuan:

(1) Pelbagai isu yang dibangkitkan oleh responden dalam OS yang dimulakan menurut s 35(1) AMK terhadap tindakan yang diambil atau aduan yang dibuat oleh perayu adalah prematang memandangkan fakta bahawa perkara yang sama sedang menunggu perbicaraan di MM. Responden dikekalkan hak untuk mengemukakan pembelaannya dan menjawab pertuduhan di MM mengikut undang-undang dan prosedur yang ditetapkan dalam Kanun Tatacara Jenayah ('KTJ'). Oleh itu, tindakan responden dalam memulakan tindakan ini untuk membatalkan pertuduhan di MM sebelum perbicaraan tamat bukan sahaja prematang tetapi sama seperti penyalahgunaan proses mahkamah. Responden telah tersalah anggap apabila berhujah bahawa Mahkamah Tinggi dalam melaksanakan bidang kuasa penyeliaannya boleh di sisi undang-undang membuat penemuan di peringkat penyeliaan tentang prosiding pertengahan mahkamah bawahan di bawah s 35 AMK yang memperuntukkan semakan '... di mana-mana peringkat ...' prosiding dalam MM. Semakan sedemikian tidak akan dilanjutkan kepada membuat penemuan fakta dalam bidang kuasa mahkamah perbicaraan (lihat perenggan 29 & 33).

(2) HMT telah gagal untuk menghargai bahawa beliau menjalankan kuasa penyeliaannya di bawah bidang kuasa sivil asal Mahkamah Tinggi dan bukan bidang kuasa jenayahnya mengikut KTJ. Oleh itu, HMT telah jatuh ke dalam kesilapan prinsip apabila membuat keputusan bahawa pertuduhan tersebut dengan betul dibawa ke hadapan MM adalah salah di sisi undang-undang. Tiada persoalan bahawa pertuduhan itu adalah dalam bidang kuasa MM yang diperuntukkan di bawah Akta Mahkamah Rendah 1948. HMT telah bertindak di luar bidang kuasa sivil Mahkamah Tinggi apabila memberikan perintah yang dipohon yang serupa dengan pengisytiharan terhadap prosiding yang belum selesai dalam mahkamah jenayah, walaupun di mahkamah bawahan Mahkamah Tinggi. HMT jelas terkhilaf dalam undang-undang untuk memutuskan dalam tindakan sivil kesahihan pertuduhan jenayah yang masih belum ditentukan oleh MM yang menjalankan bidang kuasa jenayah. Perintah pengisytiharan yang dipohon di Mahkamah Tinggi dengan jelas berkaitan undang-undang jenayah dan Mahkamah Tinggi dalam menjalankan bidang kuasa sivilnya jelas tidak diberi kuasa untuk memberikan perintah tersebut (lihat perenggan 36–37 & 42).]

Cases referred to

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 3 CLJ 153; [2020] 2 AMR 517, FC (refd)
Chia Ai Min & Ors v PP [2021] MLJU 2651, HC (refd)
Datin Seri Rosmah bt Mansor v PP and another appeal [2022] 3 MLJ 601; [2022] 1 LNS 425, CA (refd)
Subramaniam a/l Gopal v PP [2010] 2 MLJ 525, HC (refd)
Tropiland Sdn Bhd v PP [1993] 2 MLJ 261, HC (refd)
Uthayakumar a/l Ponnusamy v YAB Dato' Sri Najib bin Tun Razak Perdana Menteri Malaysia & Ors [2017] 1 MLJ 235, CA (refd)

Legislation referred to

Criminal Procedure Code ss 173, 173(g), 323, 376(3), 377(b), (b)(6)
Courts of Judicature Act 1964 ss 3, 35, 35(1)
Federal Constitution arts 76(4), 145(3)
Local Government Act 1976
Rules of Court 2012 O 1A, O 7
Street Drainage and Building Act 1974 ss 70, 70(1), (2), (16), (17)(a), 123
Strata Title Act 1985
Subordinate Courts Act 1948

Appeal from: *Bonifac Lobo a/l Robert V Lobo v Majlis Bandaraya Petaling Jaya* [2021] MLJU 2828 (High Court, Shah Alam)

Mohd Azlan bin Mashod (with Siti Hadijah bt Ahmad and Nabila bt Sulaiman) (Azlan Hadijah & Assoc) for the appellant.
Bonifac Lobo a/l Robert V Lobo (Lobo & Assoc) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] The plaintiff/respondent brought an originating summons at the High Court wherein he made an application under s 35 of the Courts of Judicature Act 1964 ('the CJA') under the general supervisory and revisionary jurisdiction of the High Court for a declaration:

(a) that the complaint made by the defendant dated 17 July 2019 is without basis and invalid at law; and

(b) that all consequential proceedings are null and void at law, particularly art 145(3) of the Federal Constitution ('the FC'), and be struck out or set aside.

[2] Amongst the reliefs that he sought under O 7 of the Rules of Court 2012 are the following:

(a) a declaration as above;

(b) a stay of proceedings that arose out of the said complaint pursuant to s 35 of the Courts of Judicature Act 1964 in the overriding interests of justice under O 1A, ROC and the inherent jurisdiction of the court;

(c) any other relief or remedy deemed fit by the court;

(d) liberty to apply for consequential orders; and

(e) costs to be paid by the defendant to the plaintiff.

SALIENT FACTS

[3] The respondent, at the material time until around June 2020, was the registered owner of the premises known as A-05-01 Blok A Plaza Kelana Jaya, Jalan SS7/13A, Petaling Jaya, Selangor ('the premises') under the Strata Title Act 1985 (Act 318) ('the STA 1985').

[4] The appellant, Majlis Bandaraya Petaling Jaya, is a local authority created under the Local Government Act 1976 (Act 71) pursuant to art 76(4) of the Federal Constitution.

[5] The respondent was summoned by the appellant via a complaint dated 17 July 2019 (exh BL1). The summons related to an overhead shelter built on the accessory parcel to the premises without prior permission from the appellant under the SDBA 1974.

[6] The respondent was charged under s 70(1) of the SDBA 1974.

[7] The respondent pleaded not guilty to the charge at the magistrate's court.

[8] The respondent's appeal to the Shah Alam High Court (Criminal Appeal No BA-41(Ors)-6–07 of 2020) was dismissed on 2 September 2020 based on DPP's preliminary objection that interlocutory matters cannot be appealed against.

[9] The respondent filed an originating summons at the High Court for a declaration that the complaint made by the appellant dated 17 July 2019 is without basis dan invalid at law.

[10] On 12 August 2021, the learned High Court judge ('LJ') allowed the respondent's application with costs of RM1,000.

OUR DECISION

[11] In the LJ's view, the issues that arose for the court's determination from the appellant's application were correctly stated to be these:

(a) whether the plaintiff's application is res judicata because the plaintiff's appeal against the charge was dismissed by the Shah Alam High Court ('SAHC');

(b) whether there was consent from the public prosecutor ('PP') as required under s 123 of the SDBA 1974 prior to the institution of the proceedings against the plaintiff; and

(c) whether the charge against the defendant under s 70(1) of the SDBA 1974 is bad in law and without basis.

[12] Upon duly deliberating on the above core issues and considering the factual matrix of the case in applying the relevant principles of law to the facts, the LJ came to a determination as follows:

(a) whether the plaintiff's application is res judicata because the plaintiff's appeal against the charge was dismissed by the Shah Alam High Court:

  (i) the plaintiff's application in this action is not res judicata because the plaintiff's appeal to the SAHC was not heard on its merits by the court; and

  (ii) the records show that the appeal was dismissed based on the preliminary objection by the DPP on the grounds that the High Court did not have the jurisdiction to hear the plaintiff's appeal against the ruling made by the magistrate's court prior to the disposal of the proceedings at the magistrate's court. The High Court agreed with the DPP's preliminary objection and dismissed the appeal.

(b) was the consent of the public prosecutor ('PP') obtained prior to the institution of the proceedings against the plaintiff under s 70(1) of the SDBA 1974?

  (i) this court is satisfied that by virtue of the art 145(3) of the FC, s 376(3) of the CPC and the 'Izin Pendakwaan' issued by the DPP of Selangor that the PP had consented to and authorised the institution of the prosecution against the plaintiff under s 70(1) of the SDBA 1974;

  (ii) this court is also satisfied that the officer of the defendant has been authorised to conduct the prosecution under s 377(b) of the CPC. Exhibit B in the *afidavit jawapan defendan* affirmed on 4 February 2021 (encl 8) shows that the authorisation was given by the

A Selangor DPP under s 377(b) of the CPC to the legal officer of the defendant, Encik Mohd Yusof bin Che Aziz, to conduct the prosecution at the Selangor Magistrate's Court; and

(iii) accordingly, this court finds that the prosecution is not in breach of art 145(3) of the FC.

B

(c) is the charge against the plaintiff under s 70(1) of the SDBA 1974 bad in law?

(i) the plaintiff was charged under s 70(1) of the SDBA 1974 for 'erecting a building' without the prior written permission of the defendant,

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(d) does the overhead structure built on the accessory parcel to the premises constitute 'erecting a building' under s 70 of the SDBA 1974?

D

(i) the structure ie an overhead shelter, which is the subject matter of charge against the plaintiff at the magistrate's court was built on an accessory parcel to the premises;

(ii) the buildings that fall under the proviso in s 70(16) of the SDBA 1974 include those that fall within sub-para (b)(ii) of s 70(16) ie 'new or partly new or increased superstructure or roof on existing walls or existing foundations';

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(iii) hence, the overhead structure built on the accessory parcel to the premises falls within the proviso in s 70(16) of the SDBA 1974. Accordingly, as held in *Tropiland Sdn Bhd v Public Prosecutor* [1993] 2 MLJ 261, the construction of the overhead shelter in this instant case falls within the proviso in s 70(16) of the SDBA and for this reason shall not be construed as erection of a building under s 70 of the SDBA 1974.

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G

(e) can the plaintiff be deemed to have erected the building on the premises?

(i) as the owner of the premises, if a building was erected on the premises, the plaintiff can be deemed to have commenced or carried out the erection of the building on the premises. However, in this instant case, since the construction of the overhead structure building falls within the proviso in s 70(16) of the SDBA 1974, the plaintiff cannot be deemed to have commenced or carried out the erection of the building on the premises;

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(ii) furthermore, based on the *Percakapan dalam Pemeriksaan* (encl 2, BL1, p 9) of Jubpiri bin Marwan, the officer of the defendant that made the complaint, the defendant was aware that the building was erected by the tenant of the premises on the accessory parcel and not the plaintiff, who is the owner of the premises;

(iii) therefore, the presumption under s 70(17)(a) of the SDBA 1974 that the owner of the land on which the building was erected had built the building has been rebutted for the following reasons:

(A) the building falls within the proviso in s 70(16) of the SDBA 1974 and accordingly does not constitute 'erection of a building' under s 70 of the SDBA 1974; and/or

(B) the building was erected by the tenant occupying the premises.

(f) accordingly, the plaintiff as the owner of the premises cannot be deemed to have erected the building or be held liable based on the presumption in s 70(17)(a) of the SDBA 1974 for the erection of the structure on the accessory parcel to the premises; and

(g) thus, it is hereby declared that the complaint dated 17 July 2019 made by the defendant against the plaintiff and the prosecution of the plaintiff in respect of the building erected on the accessory parcel to the premises is without basis and bad at law.

[13] We have set out in detail the findings made by the LJ as the findings of fact, particularly in regard to the issue of the charge being bad in law have been seriously challenged by the appellants as being premature, unwarranted and in excess of the jurisdiction of the civil court in an as action.

[14] On the principal issue of res judicata, the LJ concluded that the law is settled that a court does not have the jurisdiction to hear an appeal on any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties: see s 3 of the CJA 1964 and the Federal Court's decision in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153; [2020] 2 AMR 517,

[15] Our view is that the LJ had correctly stated and applied the law in resolving this issue. As there is no serious flaw in the LJ's decision on a question of law, we will not dwell further on the issue of res judicata.

[16] Proceeding now to the second core issue relating to the powers of the PP, the LJ correctly observed that the PP is empowered by s 376(3) of the CPC to appoint DPPs who shall be under the direction and general control of the PP, and who may exercise all or any of the rights vested in the PP by or under the CPC or any other written law.

[17] The dispute arose in regard to the consent for the prosecution (*izin pendakwaan*) of the respondent was given by the Selangor deputy public prosecutor (*timbalan pendakwa raya*) pursuant to the PP's powers under

art 145(3) of the Federal Constitution and the authority given to him under s 376(3) of the CPC.

[18] After considering the consent to prosecute (*izin pendakwaan*) the LJ held that she was satisfied that by virtue of the art 145(3) of the Federal Constitution, s 376(3) of the CPC and the *izin pendakwaan* issued by the deputy public prosecutor ('DPP') of Selangor, the public persecutor ('PP') had consented to and authorised the institution of the prosecution against the plaintiff under s 70(1) of the SDBA 1974.

[19] Also that the prosecuting/legal officer of the defendant ('MBPJ') had been authorised to conduct the prosecution of the respondent under s 377(b) of the CPC as pursuant to s 377(b)(6) of the CPC, the Selangor DPP had issued the letter authorisation to the legal officer of MBPJ named therein to conduct the prosecution.

[20] The LJ noted that the respondent referred to the case of *Subramaniam a/l Gopal v Public Prosecutor* [2010] 2 MLJ 525 to support his contention that the PP neither consented to nor authorised the prosecution of the respondent for the offence as per charge.

[21] However, the LJ in our view, correctly held that the facts of *Subramaniam* are distinguishable in that in *Subramaniam* no consent to prosecute issued on behalf of the PP had been shown to or tendered, in court. For this reason, the LJ concluded that the prosecution of the plaintiff was instituted with the consent and/or authority of the PP. Accordingly, the prosecution is not in breach of art 145(3) of the Federal Constitution.

[22] What is left for our determination is the LJ's finding on the ultimate issue, ie, whether the charge against the appellant under s 70(1) was bad in law. It is this decision from which the appellant's dissatisfaction stems in relation to whether the LJ had wrongfully exercised criminal jurisdiction in a civil action.

[23] In gist, the charge against the appellant was for erecting a building without the prior written permission of the local authority, in this instance, MBPJ.

[24] In the process of arriving at her decision on this issue, the LJ duly considered the relevant provisions of s 70(1) and (2) of SBDA and the definition provision: s 70(16) of SBDA. In the interpretation of the provision to s 70(16), the LJ adopted the judgment in a case in point, *Tropiland Sdn Bhd v Public Prosecutor* [1993] 2 MLJ 261 by Vincent Ng J (as he then was).

[25] Thereafter, upon examining the elements of the proviso to s 70(16), SBDA and the instant facts, the LJ came to a determination that the overhead structure built by the respondent fell within the proviso to this sub-section and hence, that it cannot be construed as erection of a building under s 70, SBDA 1974. The LJ went on to further analyse the facts and the law, including the Strata Titles Act 1985 ('the STA'). Eventually, the LJ came to a finding that the plaintiff (respondent) as the owner of the premises cannot be deemed to have erected the building or be held liable based on the presumption in s 70(17)(a) of the SDBA 1974 for the erection of the structure on the accessory parcel to the premises.

[26] It is this decision that raises concern as the LJ seems to have arrived at a finding on the charge that the respondent was facing in the magistrate's court, specifically that the respondent cannot be held guilty of the charge.

[27] The question before us was whether the LJ had come to a determination on the charge in the court below and encroached into the realm of criminal jurisdiction beyond the purview of the application vide the OS before her under the High Court's civil jurisdiction. The resolution of this question would suffice for the disposal of this appeal on a significant point of law.

[28] It was the appellant's contention that the LJ fell into serious error when she proceeded to make a finding on the charge under s 70(1), SDBA 1974 that was pending before the magistrate's aourt where the trial had already begun. There was, thus, available to the respondent a recourse to defend himself against the charge preferred. The right to pursue his defence remained intact which would have enabled him to sufficiently ventilate his grievance.

[29] We are inclined to agree with the appellant's proposition that the various issues raised by the respondent in the OS commenced pursuant to s 35(1) of the Courts of Judicature Act 1964 ('the CJA') against the action taken or complaint made by the respondent are premature given the fact that the same subject-matter was pending trial at the magistrate's court ('MC'). It bears reiteration that the respondent retained the right to put forth his defence and answer the charge at the MC in accordance with law and procedure as prescribed in the Criminal Procedure Code ('the CPC'). In our view, the CPC provides adequate procedural safeguards for any accused person to present his defence and adduce evidence as he sees fit. Hence, it would appear that the respondent's action in commencing the present action to strike out the charge at the MC before conclusion of the trial is not only premature but, as contended by the appellant, is tantamount to an abuse of the court process. We would not touch on the appellant's allegation that recourse to the supervisory and revisionary jurisdiction of the HC under s 35(1) of the CJA could amount to mala fide on the part of the respondent intended to obstruct a fair trial at the

MC. We would acknowledge that the respondent has in law the right to invoke s 35(1), CJA where the circumstances so permit in the interests of justice.

[30] For convenience, we reproduce s 35(1), CJA below:

> 35 General supervisory and revisionary jurisdiction of High Court
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> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
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> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[31] Where the MC has adhered to the strict procedure prescribed under s 173 of the CPC, there can be no question of injustice occasioned to the respondent for the HC to invoke its revisionary powers under s 323 of the CPC and s 35 of the CJA. It is not the intention of the revisionary process to serve as a backdoor access to the appeal process when the matter in dispute is appealable.

(See *Chia Ai Min & Ors v Public Prosecutor* [2021] MLJU 2651.)

[32] We must emphasise that the respondent would be entitled to exercise his unconditional legal right of appeal to the HC in the event of dissatisfaction with the finding of the Magistrate at the conclusion of the summary trial.

[33] In our considered view, the respondent was misconceived in contending that the High Court in exercising its supervisory jurisdiction can in law make that finding at this supervisory stage about proceedings midway in the court below under s 35 of the CJA 1964 which provides for review '… at any stage …' of proceedings in the magistrate's court. Such review would not extend to making findings of fact within the purview of the trial court.

[34] We would proceed to deliberate on the fundamental issue of whether the LJ had erred in law and fact in holding that the charge against the respondent in the MC under s 70(16), SBDA was bad in law.

[35] Again, we are convinced by the appellant's proposition that the determination by the LJ as above in the exercise of the HC's supervisory jurisdiction was premature and pre-empted the trial magistrate from making his findings on the core issues pertaining to the sustainability of the charge. As the trial is ongoing, if the charge is in fact bad in law and groundless, it was open to the respondent, as any other person charged facing a summary trial, to invoke s 173(g) of the CPC to be discharged of the charge on the ground of the charge being groundless. Any party dissatisfied with the decision of the magistrate would be at liberty to bring an appeal to the HC at the appropriate stage instead of obstructing the trial from proceeding.

[36] We are, additionally inclined to uphold the appellant's contention that the LJ had importantly failed to appreciate that she was exercising her supervisory powers under the High Court's original civil jurisdiction and not its criminal jurisdiction in accordance with the CPC. Hence, the LJ had fallen into an error of principle when she came to a decision that the said charge rightly brought before the MC was bad in law. There was no question that the charge was within the jurisdiction of the MC provided for under the Subordinate Courts Act 1948.

[37] In our judgment, the LJ had acted beyond the HC's Civil jurisdiction when she granted the orders sought which are akin to a declaration against a pending proceeding in a criminal court, albeit in a court subordinate to the HC.

[38] We would further deliberate on an important point raised by the appellant as regards the reliefs sought by the respondent at the HC wherein the reliefs were in the nature of a declaration affecting pending criminal proceedings. Reliance was placed on the judgment of the Court of Appeal ('COA') in *Datin Seri Rosmah bt Mansor v Public Prosecutor and another appeal* [2022] 3 MLJ 601; [2022] 1 LNS 425 which dealt with the powers of the High Court exercising civil jurisdiction to grant declaratory orders in respect on ongoing criminal proceedings brought by the public prosecutor for charges lawfully instituted by him. The judgment insofar as relevant to the issue at hand states in precise terms as follows:

> [40] Learned senior DPP drew a distinction between the civil jurisdiction of the High Court and its criminal jurisdiction. In support of his contention, learned Senior DPP cited the judgment of Tun Salleh Abas, LP in the Supreme Court case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, wherein it was contended that there is a separation of the system of criminal justice from that of the civil justice system.

[39] Her Ladyship, Tengku Maimun, JCA (now CJ) who delivered the decision in the case *Uthayakumar a/l Ponnusamy v YAB Dato' Sri Najib bin Tun*

Razak Perdana Menteri Malaysia & Ors [2017] 1 MLJ 235 stated at p 246:

> [17] Further, it must be kept in mind that the application was filed as a miscellaneous criminal application and that the law governing criminal procedure is the CPC. As such, the applicant must conform to the provisions of the CPC in making the application, that is to say, the reliefs prayed for must fall within the matters allowed under the CPC. However, we found nothing in the CPC to support the application for the above reliefs.
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> [18] At this juncture, it is pertinent to highlight that the applicant was seeking for the reliefs of mandamus and declaration which reliefs are provided for under the Specific Relief Act 1950 ('the SRA'). SRA pertains essentially to reliefs and remedies for civil action. And insofar as civil action is concerned, the definition in s 3 of the CJA reads:
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> > a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding;
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> While sub-s 21(1) of the GPA provides that:
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> > Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia.

[40] Essentially, the emphasis was on the distinction between the civil and criminal jurisdictions of the High Court, particularly where orders are sought in the civil High Court over proceedings instituted in another court exercising criminal jurisdiction. It clearly applies to the instant case where the declaratory order sought by the respondent encroaches into the realm of criminal law as evidenced by the charge that the respondent was facing in the magistrate's court.

[41] In *Datin Seri Rosmah bt Mansor* the court adopted the *Gouriet* principle as follows:

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the Public Prosecutor, he, not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the Attorney-General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.

[42] To our minds, it was correctly contended by the appellant that the LJ had clearly erred in law to decide in a civil action the validity of a criminal

charge that had yet to be determined by a magistrate's court exercising criminal jurisdiction. The declaratory order sought in the High Court plainly pertained to criminal law and the High Court in the exercise of its civil jurisdiction was clearly not vested with powers to grant the said order.

CONCLUSION

[43] For the foregoing reasons, we upheld the appellant's contention that the LJ had plainly erred in principle and fact in her decision to allow the respondent's judicial review application for a declaration and ancillary orders prayed for against the respondent. In essence, it had the effect of preventing the determination of a criminal trial of the magistrate's court which proceeded in accordance with law and the procedure laid down in the CPC. The prosecution had been denied its right to adduce all its evidence for the consideration, evaluation and determination or findings by the trial court on the charges against the respondent.

[44] Having heard the appeal and considered the rival contentions of the parties, we arrived at our unanimous decision supported by brief reasons as follows:

(a) we find merits in this appeal. The issue before us is one of jurisdiction of the Civil High Court in making declarations affecting the conduct of a prosecution in the magistrate's court for an offence under the Street Drainage and Building Act 1974 ('the SDBA');

(b) the prosecution was commenced with the consent of the PP and which issue had been determined in the High Court in a previous action and the order remains;

(c) the criminal proceedings are before the magistrate's court exercising its criminal jurisdiction. If, as in this case, the respondent is aggrieved with the preference of a charge against him, he should seek the appropriate remedy at the trial court as allowed under the CPC;

(d) he cannot mount a challenge against a criminal charge by invoking the civil jurisdiction of the High Court as was held in *Datin Seri Rosmah bt Mansor v Public Prosecutor and another appeal*, a decision of the Court of Appeal;

(e) we see no good reason not to follow that decision;

(f) therefore, we allow the appeal and set aside the decision and order of the HC;

(g) we exercise our discretion and make each party bear their own costs; and

(h) cross-appeal by the respondent is also correspondingly dismissed in the light of our decision on the appeal with no order as to costs.

A *Appeal allowed.*

Reported by Ahmad Ismail

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